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SIXTH REPORT ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

by

Mr. Stephen C. McCaffrey, Special Rapporteur

Corrigendum

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Change the last sentence of paragraph 38 to read as follows:

"Draft article 6 deals with jurisdictional immunity, providing that a watercourse State that has caused harm to persons in other States should enjoy no greater jurisdictional immunity with regard to those persons than it does with regard to its own citizens. Draft article 7 establishes a procedure for regular meetings of a 'Conference of the Parties' to review the implementation of the draft articles and perform other functions. Finally, draft article 8 sets forth procedures for amendment of the draft articles by the Conference of the Parties. The Special Rapporteur recognizes that draft articles 7 and 8 of annex I, like other articles in that annex, could well form a part of the main body of the draft articles rather than being placed in an annex. He has included them in the annex not for substantive reasons but because the outline of the draft articles approved by the Commission did not contain provisions of the kind proposed in the present chapter. The Special Rapporteur recommends, however, that the Commission consider the possibility of including the provisions contained in annex I in the body of the draft articles."

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Insert the following as a new paragraph (2 bis) of the comments to draft article 4 of annex I:

"(2 bis) In article 8 of its 1982 Montreal Rules on Water Pollution in an International Drainage Basin, 107a/ the International Law Association called upon States to provide affected persons with access to judicial and administrative procedures on a non-discriminatory basis:

Article 8

States should provide remedies for persons who are or may be adversely affected by water pollution in an international drainage basin. In particular, States should, on a non-discriminatory basis, grant these persons access to the judicial and administrative agencies of the States in whose territory the pollution originates, and should provide, by agreement or otherwise, for such matters as the jurisdiction of courts, the applicable law, and the enforcement of judgements."

107a/ International Law Association, Report of the Sixtieth Conference, Montreal, 1982, (1983), pp. 13, 535 et seq.

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Insert the following in paragraph (1) of the comments to draft article 5 of annex I, in line 5 following the words "inter alia":

"the resolution agreed to by 34 States at the Sofia Meeting on the Protection of the Environment of the Conference on Security and Co-operation in Europe of November 1989. 110a/ The resolution states that,

'the participating States reaffirm their respect for the right of individuals, groups and organizations concerned with environmental issues ... to obtain, publish and distribute information on these issues, without legal and administrative impediments inconsistent with the CSCE provisions.' 110b/

The participating States further undertake to

'promote the reproduction, circulation and exchange of information and data, as well as of audiovisual and printed material, on environmental issues, and encourage public access to such information, data and material.' 110c/

A similar right of access by the public to environmental information has been recognized by the European Community. 110d/

Access to information by individuals is also provided for ..." [continue with existing text]

110a/ Document CSCE/SEC.36/Rev.1, Sofia, 3 November 1989.

110b/ Ibid. at p. 2.

110c/ Ibid. See also the Joint Agenda for Action prepared by the Preparatory Committee for the Bergen Conference, second session (Geneva, 5 - 9 March 1990) (agenda item 5), BERGEN-90/PC.2/3/Rev.2, 9 March 1990, which contains a section on "Awareness raising and public participation". Ibid. at p. 2.

110d/ The environment ministers of the European Community adopted a directive on 22 March 1990 that will allow citizens greater access to information concerning the environment. The directive, which will go into effect 1 January 1993, "gives anyone the right of access to any environmental information held by public authorities, and guarantees access to the information on written request. In addition, it requires member States to provide environmental information more actively through regular publication of reports." Bureau of National Affairs. International Environment Reporter, vol. 13, No. 4. Current Report, 11 April 1990, p. 143.

Municipal law of a number of States also requires the provision of information to the public on activities that pose a significant risk of causing appreciable harm. For an example of a recent statute, see the United States "Emergency Planning and Community Right-to-Know" Law, Title 42 United States Code, Sections 11001-11050. Public Law 99-499, 17 October 1986.

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Add the following new articles and comments at the end of the document:

Article 7

Conference of the Parties

1. Not later than two years after the entry into force of the present draft articles, the Parties to the draft articles shall convene a meeting of the Conference of the Parties. Thereafter the Parties shall hold regular meetings, at least once every two years unless the Conference decides otherwise, and extraordinary meetings at any time upon the written request of at least one third of the Parties.

2. At the meetings provided for in paragraph 1, the Parties shall review the implementation of the present draft articles. In addition, they may:

(a) consider and adopt amendments to the present draft articles in accordance with article 8 of this annex;

(b) receive and consider any reports presented by any Party or by any panel, commission or other body established pursuant to annex II to these draft articles; and

(c) where appropriate, make recommendations for improving the effectiveness of the present draft articles.

3. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 1 of this draft article.

4. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

5. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not a party to the present draft articles, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

6. Any of the following categories of bodies or agencies which is technically qualified with regard to the non-navigational uses of international watercourses, including the protection, conservation and management thereof, and which has informed the Parties of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one third of the Parties present object:

(a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

Once admitted, observers representing these agencies and bodies shall have the right to participate but not to vote.

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Comments

(1) Several recent conventions relating to the environment or transboundary harm contain provisions for regular meetings of a "conference of the Parties". ^{125/} In general, these agreements provide for institutionalized and regular collective action by the contracting Parties. This technique permits the review, on a regular basis, of the effectiveness of the convention in question and allows monitoring by the Parties of its implementation. Other multilateral agreements have made effective use of similar devices as an element of their dispute-settlement mechanisms. ^{126/}

(2) Draft article 7 is based on article XI of the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 2 March 1973 (CITES). ^{127/} That article provides as follows:

Article XI. Conference of the Parties

1. The Secretariat shall call a meeting of the Conference of the Parties not later than two years after the entry into force of the present Convention.
2. Thereafter the Secretariat shall convene regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time on the written request of at least one third of the Parties.

^{125/} See, e.g., the Convention on International Liability for Damage Caused by Space Objects, 29 March 1972, Geneva, United Nations, Treaty Series, vol. 961, p. 187, article XXVI; the Geneva Convention on Long-Range Transboundary Air Pollution, 13 November 1979, document ECE/HLM.1/R.1, reprinted in International Legal Materials, vol. 18 (1979), p. 1442, article 10 (denominated the "Executive Body" of the Convention); the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 2 March 1973 (CITES), United Nations, Treaty Series, vol. 993, p. 243, article XI (set forth in paragraph (2) below); the Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, Geneva, International Legal Materials, vol. 26 (1987), p. 1516, article 6; and the Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, International Legal Materials, vol. 26 (1987), p. 1541, article 11 (providing for ordinary meetings to be held in conjunction with the Conference of the Parties to the underlying Vienna Convention, previously cited, and extraordinary meetings to be held at the request of at least one third of the Parties).

^{126/} See especially the General Agreement on Tariffs and Trade (GATT), article XXIII, United Nations, Treaty Series, vol. 55, p. 194. Relevant GATT procedures are discussed in the following chapter of the present report, on the settlement of disputes.

^{127/} United Nations, Treaty Series, vol. 993, p. 243.

3. At the meetings, whether regular or extraordinary, the Parties shall review the implementation of the present Convention and may:

(a) make such provision as may be necessary to enable the Secretariat to carry out its duties;

(b) consider and adopt amendments to appendices I and II in accordance with article XV;

(c) review the progress made towards the restoration and conservation of the species included in appendices I, II and III;

(d) receive and consider any reports presented by the Secretariat or by any Party; and

(e) where appropriate, make recommendations for improving the effectiveness of the present Convention.

4. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 2 of this article.

5. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

6. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not a Party to the present Convention, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

7. Any body or agency technically qualified in the protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one third of the Parties present object:

(a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located. Once admitted, these observers shall have the right to participate but not to vote.

(3) Article XII of CITES provides that "a Secretariat shall be provided by the Executive Director of the United Nations Environment Programme" upon the entry into force of the Convention. While it would clearly be useful to have a secretariat to perform such functions as convening and servicing meetings of the Conference of the Parties, and conducting studies and research at the request of the Parties to the present draft articles, the Special Rapporteur is hesitant to propose the establishment of a permanent institution in connection with what is envisaged as a framework agreement. If a convention is eventually concluded on the basis of the present draft articles, the parties may certainly establish such an institution if they so desire.

Article 8

Amendment of the draft articles

1. An extraordinary meeting of the Conference of the Parties shall be held on the written request of at least one third of the Parties to consider and adopt amendments to the present draft articles. Such amendments shall be adopted by a two-thirds majority of the Parties present and voting. For the purposes of the present draft article, "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two thirds required for adopting an amendment.
2. The text of any proposed amendment shall be communicated by the Party or Parties proposing it to all Parties at least 90 days before the meeting.
3. An amendment shall enter into force for the Parties that have accepted it 60 days after two thirds of the Parties have deposited an instrument of acceptance of the amendment with the [Depositary Government] [Secretary-General of the United Nations]. Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment.

Comments

(1) The Special Rapporteur believes that it is important to provide for the amendment of the draft articles in order to enable the Parties to take into account changing developments. For example, rapid increases in pollution of fresh water and the intensification of such problems as drought and desertification might prompt the Parties to update the provisions of the present draft articles concerning those subjects.

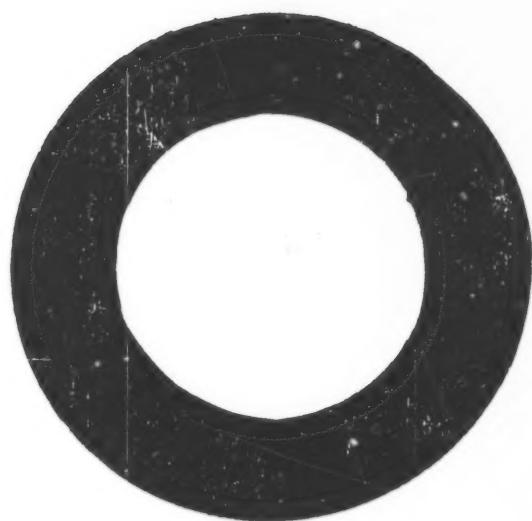
(2) Draft article 8 is based on article XVII of the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 2 March 1973. That article provides as follows:

Article XVII. Amendment of the Convention

1. An extraordinary meeting of the Conference of the Parties shall be convened by the Secretariat on the written request of at least one third of the Parties to consider and adopt amendments to the present Convention. Such amendments shall be adopted by a two-thirds majority of the Parties present and voting. For these purposes "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two thirds required for adopting an amendment.
2. The text of any proposed amendment shall be communicated by the Secretariat to all Parties at least 90 days before the meeting.

3. An amendment shall enter into force for the Parties which have accepted it 60 days after two thirds of the Parties have deposited an instrument of acceptance of the amendment with the Depositary Government. Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment.

(3) The only material respects in which draft article 8 departs from article XVII of CITES are the provisions concerning the Secretariat in paragraphs 1 and 2 of the latter and the depositary in paragraph 3. The matter of a secretariat is addressed in the comments to article 7 of the present annex. As to the depositary, it could be a Government, the Secretary-General of the United Nations, or the head of another appropriate body such as the United Nations Environment Programme (UNEP) or the Food and Agriculture Organization of the United Nations (FAO). The remaining provisions of Article XVII were considered appropriate by the Special Rapportuer for use in the context of the present draft articles. He would welcome comment, in particular, with regard to the provisions of paragraph 3 concerning entry into force of amendments.





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Addendum

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IV. SETTLEMENT OF DISPUTES

A. Introduction

40. The subject of settlement of disputes has been treated by two of the previous Special Rapporteurs, both of whom have proposed draft articles on this subtopic. It is indeed an integral part of a set of draft articles on the law of the non-navigational uses of international watercourses, but for somewhat different reasons than would apply in most other fields of international law. Chief among these reasons is the general and flexible nature of some of the most fundamental provisions of the draft articles (such as art. 6, Equitable and reasonable utilization and participation). The very same generality and flexibility of these provisions that makes them so well-suited to a framework instrument on international watercourses may also make them difficult to apply with precision in some cases. Furthermore, the operation of many of the provisions of the draft articles depends upon certain key facts. To the extent that the watercourse States concerned do not know or agree upon these facts, their legal obligations will not be clear. Some means of objectively establishing the operative facts will therefore be necessary in such cases.

41. It has been seen in this and previous reports that watercourse States frequently entrust the gathering of data and information concerning international watercourses to technical experts, often operating within the context of a joint commission or other institutional arrangement. As indicated in chapter I of the present report, where such joint commissions have been established they will often be in the best position to engage in fact-finding and to resolve any questions that may arise with regard to the respective obligations of the watercourse States concerned. Even where such bodies have not been formed, State practice and the works of experts who have studied the question ^{125/} indicate that, wherever

^{125/} See especially Management of international water resources ... (*supra*, note 3), chap. V, "Accommodation procedures and dispute settlement", especially paras. 455 and 457-458. See also, e.g., H. Smith (*supra*, note 8), p. 152 (principles 6 and 7); Berber, Rivers in International Law (1959), p. 271; and Bourne, "Mediation, conciliation and adjudication in the settlement of international drainage basin disputes", The Canadian Yearbook of International Law, vol. IX (1971), p. 114. See generally Bourne, "Procedure in the development of international drainage basins: The duty to consult and to negotiate", The Canadian Yearbook of International Law (1972), pp. 212-234; R. Bilder, The Settlement of International Environmental Disputes, University of Wisconsin Sea Grant College Program, Technical Report No. 231, February 1976; A. Levin, Protecting the Human Environment: Procedures and Principles for Preventing and Resolving International Controversies (UNITAR/PS/9) (United Nations publication Sales No. E.77.XV.PS/9); Stein, "The settlement of environmental disputes: Towards a system of flexible dispute settlement", Syracuse J. Int'l L. & Com. (1985), p. 283; and the sources cited in S. Schwebel, third report (*supra*, note 2), notes 776 and 778, at pp. 181-182.

possible, it is advisable to attempt resolution of any differences at the technical level before proceeding to invoke more formal dispute-resolution procedures.

42. In the light of these considerations, the present chapter proposes a process for the avoidance and settlement of watercourse disputes that consists of a graduated series of stages. The proposals are based on several propositions: first, that it will often be necessary in this field to rely heavily upon technical expertise; secondly, that a non-binding expert report, possibly accompanied with a recommended course of action, will frequently result in resolution of an actual or potential dispute without the need to have recourse to a procedure that results in a binding settlement; and thirdly, that procedures of the latter kind should be resorted to only after attempts to settle differences at the technical level have failed.

43. It will be evident from the foregoing discussion that, notwithstanding the title of the present chapter, the proposals it contains are not confined to the "settlement of disputes" as that term is generally understood. The expression "international water law dispute" has been defined as

"an international dispute between two or more than two international drainage basin states ..., with respect to

- (i) the conservation, use, sharing (including sharing of benefits), control, development or management of the water resources of an international drainage basin, [or]
- (ii) the interpretation of the terms of any agreement relating to the conservation, use, sharing (including sharing of benefits), control, development and management of such water resources or the implementation of such an agreement including all matters arising out of the implementation of such an agreement." 126/

This definition focuses on the usual subject-matter of disputes relating to international watercourses. While it does not refer expressly to factual questions, they are often at the root of the matters mentioned. However, procedures such as fact-finding also concern implementation of the draft articles (and to this extent could have been dealt with in the preceding chapter) and avoidance of disputes. It is only when questions have not been resolved in earlier stages of the process that the proposed procedures for the settlement of disputes become applicable.

126/ B. R. Chauhan, Settlement of International Water Law Disputes in International Drainage Basins (Berlin, Erich Schmidt, 1981), pp. 96-97. Chauhan includes in this definition disputes between a "drainage basin state" and a political subdivision of a State (such as the German Laender), since the latter have on occasion entered into agreements concerning international watercourses (*ibid.*, at p. 97, note 45 and accompanying text).

44. In section B of this chapter, the Special Rapporteur will review briefly the principal means of international dispute settlement and cite examples of their use by States in the context of disputes involving international watercourses. In section C he will illustrate the use by States and international organizations of experts to assist in the avoidance and resolution of watercourse and other disputes. Section D will survey the work of international organizations concerning the settlement of such disputes, and the proposals of previous Special Rapporteurs relating to this subtopic will be recalled in section E. Finally, in section F the Special Rapporteur will submit for the Commission's consideration a set of draft articles on fact-finding and the settlement of disputes.

B. Means of dispute settlement and their application by States
in their relations concerning international watercourses

45. It would far exceed the scope and purpose of this chapter to essay an in-depth examination of the subject of the pacific settlement of disputes, especially in view of the fact that general principles of international dispute settlement are well known to members of the Commission. ^{127/} This section has a much more limited purpose, namely, to provide a backdrop against which to consider the material that follows.

46. What Judge Evensen has characterized as the "obvious starting point" ^{128/} for any treatment of the settlement of disputes is the Charter of the United Nations and, in particular Article 2. Paragraph 3 of that Article lays down the obligation to settle "international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". The first article in Chapter VI of the Charter, Pacific settlement of disputes, is Article 33, paragraph 1 of which lists the following peaceful means of dispute settlement: "negotiation, enquiry, mediation, conciliation, arbitration, judicial

^{127/} In fact, such an examination is currently being conducted in the context of the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. Specifically, the Secretariat is preparing a draft handbook on the peaceful settlement of disputes between States. See, e.g., the progress report of the Secretary-General on the draft handbook, document A/AC.182/L.61. See generally the Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (Official Records of the General Assembly, Forty-fourth Session, Supplement No. 33 (A/44/33)), especially chapter V, "Peaceful settlement of disputes between States", pp. 46-49.

For a more detailed treatment of the different means of dispute settlement discussed in this section, with particular reference to international watercourses, see Chauhan (supra, note 126), at pp. 321-367.

^{128/} J. Evensen, first report (supra, note 2), at p. 189.

settlement, resort to regional agencies or arrangements, or other peaceful means of [the parties'] own choice". The Article requires the "parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security", to seek a solution of the dispute, "first of all", by those means.

47. While some of the means of peaceful settlement listed in Article 33 will be relied upon in the procedures proposed in the present chapter, the latter procedures are intended to apply even if the continuance of a dispute concerning an international watercourse would not "endanger the maintenance of international peace and security". Indeed, Article 2, paragraph 3, requires Member States to settle international disputes by peaceful means so that, inter alia, "justice" is not endangered. This could presumably be the case even if there were no threat to "international peace and security". 129/

48. It has been observed that direct negotiation between the parties is the "simplest" of the means of peaceful settlement, "although probably the one by which the larger number of day-to-day differences are adjusted ... Through an exchange of views, usually via diplomatic channels, agreement is reached in a mutual process of give-and-take." 130/ Judge Manfred Lachs has written that "States resort to negotiations very frequently, probably owing to the fact that they are rather anxious to retain control to the very end over the decisions arising out of differences which divide them. There are of course many international disputes and

129/ "It is not enough that peace and security should be safeguarded; the principles of justice must also be respected." L. Goodrich and E. Hambro, Charter of the United Nations, Commentary and Documents, 2nd ed. (Boston, 1949), p. 102. See also the third edition of this work, by L. Goodrich, E. Hambro and A. Simons (1969), at p. 41. For a discussion of the circumstances in which international peace and security might be endangered by a dispute between watercourse States, see Bourne (supra, note 125), at p. 157. Water disputes have given rise to charges of aggression. See, e.g., Lecaros, "International Rivers - the Lauca Case", Indian Journal of International Law, vol. 3 (1963), p. 133, at pp. 148-149 (concerning the dispute between Bolivia and Chile); and the sources cited in S. Schwebel, third report (supra, note 2), note 778. The Lauca controversy is also discussed in the second report, Yearbook ... 1986, vol. II (Part One), p. 87, at p. 112, document A/CN.4/399, para. 94. Further Israel and its neighbouring Arab countries have each declared that they would consider unilateral diversions of the Jordan River as acts of aggression. See Doherty, "Jordan Waters Conflict", International Conciliation (New York), No. 533 (May 1965) at pp. 35 and 65. This dispute is also discussed in the second report (supra), at p. 112, para. 96. See generally Bourne (supra), at pp. 154-155.

130/ W. Bishop, International Law, 2nd ed. (Boston, 1962), p. 58. The Manila Declaration on the Peaceful Settlement of International Disputes describes negotiations, in its paragraph 10, as a "flexible and effective means" of dispute settlement (United Nations General Assembly resolution 37/10, annex).

problems which cannot be solved otherwise ..." ^{131/} While recognizing that "[diplomacy ... has its limits", Judge Lachs notes that "the obligation to negotiate ... does not imply an obligation actually to reach agreement. The obligation is only to try one's best." ^{132/} Or, as the International Court of Justice put it in the North Sea Continental Shelf case "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement ...; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of the parties insists upon its own position without contemplating any modification of it". ^{133/}

49. Although it is probable that the great majority of disputes concerning international watercourses have been either avoided or settled through negotiation, very few of these cases have been reported. ^{134/} In his study of the Settlement of International Water Law Disputes, B. Chauhan lists 25 treaties containing "express provisions for utilizing 'negotiation' as a method of settlement of [such]

^{131/} M. Lachs, "The law and the settlement of international disputes", in Dispute Settlement Through the United Nations (Raman ed. 1977), p. 287.

^{132/} Ibid., at p. 289.

^{133/} Federal Republic of Germany v. Denmark, and Federal Republic of Germany v. the Netherlands, Judgment of 20 February 1969, I.C.J. Reports 1969, p. 3, at p. 47, para. 85 (a). See the discussion of this and other cases concerning the obligation of States to resolve their differences through good-faith negotiations aimed at reaching an equitable result in the third report, Yearbook ... 1987, vol. II (Part One), p. 15, at pp. 25 and 37-38. Attention should also be drawn to the case of Railway Traffic between Lithuania and Poland, P.C.I.J. Series A/B No. 42, [1931], at p. 116, cited by the Court in the North Sea Continental Shelf cases (ibid., at pp. 47-48. And finally, the Manila Declaration contains language to the same effect as that of the Court in the North Sea Continental Shelf cases: "When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties." (Supra, note 130, para. 10.)

^{134/} One does encounter occasional reports of diplomatic exchanges concerning international watercourse questions. While, strictly speaking, these cases fall into the category of settlement through diplomatic channels, the Special Rapporteur will, for present purposes, treat them as being cases of settlement by negotiation lato sensu. See, e.g., the cases discussed in the second report, Yearbook ... 1986, vol. II (Part One), pp. 105-113, paras. 78-99; and in the fifth report, A/CN.4/421/Add.1, paras. 55-66.

disputes", 135/ and refers to an additional 47 agreements that call for the resolution of water-related controversies through diplomatic channels. 136/

50. According to the 1907 Hague Convention for the Pacific Settlement of International Disputes, enquiry is a process for settling "disputes arising from a difference of opinion on points of fact, ... elucidating the facts by means of an impartial and conscientious investigation". 137/ The Convention calls for the parties to such a dispute to form a commission of inquiry, whose task it would be to investigate and report on the facts. The commission's "report was not to have the character of an award, and the parties were free to decide what effect, if any, they would give it". 138/

51. In the context of the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, attention has been focused anew on the potential of fact-finding as a procedure for avoiding and resolving disputes. The Special Committee has defined "fact-finding" as follows: "any activity designed to ascertain facts which the competent United Nations organs need to exercise effectively their functions in the field of the maintenance of international peace and security". 139/ According to a working paper submitted to the Special Committee, "[f]act-finding should be comprehensive,

135/ Chauhan (supra, note 126), at pp. 377-380. An additional treaty that in effect requires negotiation but does not use that term is also mentioned, bringing the total to 26.

136/ Ibid., at pp. 381-386. An interesting procedure which combines bilateral discussions with utilization of technical experts has been proposed in paragraphs 11 to 17 of the draft American Declaration on the Environment prepared by the Inter-American Juridical Committee of the Organization of American States, OAS document CJT/Res.II-10/89(1989). The draft Declaration provides for the formation of a joint commission, consisting of two delegates from each State involved (para. 12).

137/ The Hague Conventions and Declarations of 1899-1907, ed. J. B. Scott. Carnegie Endowment for International Peace (New York, Oxford University Press, 1915), p. 45.

138/ J. Brierly, The Law of Nations, 6th ed. (Waldock, 1963), p. 374. For an instance in which such a commission was used effectively, see the "Dogger Bank" case between Great Britain and Russia, of 1904, Scott, Hague Court Reports 403 (1916).

139/ United Nations, Press Release, L/2612, 2 March 1990. This definition is also contained in the working paper submitted to the Special Committee by Belgium, Czechoslovakia, German Democratic Republic, Germany, Federal Republic of, Italy, Japan, New Zealand and Spain, document A/AC.182/L.66, 26 February 1990, p. 1, para. 2.

objective and impartial". 140/ As indicated above, fact-finding as envisaged in the draft articles proposed later in this chapter could come into play well before any threat to international peace and security arose, and indeed prior to the emergence of a "dispute". 141/ In the context of international watercourses, fact-finding is often undertaken by joint commissions. State practice in this regard is referred to below in connection with the discussion of conciliation.

52. According to Brierly, in the case of good offices, mediation and conciliation,

"the intervention of a third party aims, not at deciding the quarrel for the disputing parties, but at inducing them to decide it for themselves. The difference between [good offices and mediation] is not important; strictly a state is said to offer 'good offices' when it tries to induce the parties to negotiate between themselves, and to 'mediate' when it takes a part in the negotiations itself, but clearly the one process merges into the other". 142/

Conciliation is similar to the process of enquiry, except that the commission has the task not only of finding the facts but of making "a report containing proposals for a settlement, but not having the binding character of an award or judgement". 143/ The procedure had its genesis in a series of "treaties for the

140/ A/AC.182/L.66, para. 3. See the discussion of this working paper in the comments to article 1, below. On fact-finding as a form of "investigation" by the Security Council under Article 34 of the Charter, see Raman, "The Ways of the Peacemaker", in Dispute Settlement Through the United Nations (*supra*, note 131), at pp. 410 *et seq.* "If broadly conceived, investigatory functions can facilitate the establishment of disputed questions of fact (fact-finding in a narrow sense), and also enable the parties to establish an objective basis for their future relationships." (*Ibid.*) See also Report of the Secretary-General on methods of fact-finding, document A/5694 (1 May 1964), examining "international inquiry as a peaceful means of settling disputes or adjusting situations". (*Ibid.*, at p. 10).

141/ The International Court of Justice and its predecessor have had several occasions to consider the meaning of the term "dispute" and to determine whether a "dispute" existed between parties to a case that had been brought before them. See, e.g., Electricity Company of Sofia, [1939] P.C.I.J., Ser. A/B, No. 77, pp. 64, 83; Northern Cameroons case, I.C.J. Reports 1963 at pp. 33-34; the Nuclear Tests cases, I.C.J. Reports 1974 at pp. 260, 270-271; and the Mavrommatis case, [1924] P.C.I.J., Ser. A, No. 2, at pp. 11-12. That question will not be pursued further in the present report.

142/ *Ibid.*, p. 373 (emphasis in original).

143/ Oppenheim, International Law, 7th ed., Lauterpacht, 1948, vol. 2, p. 12. According to Bishop, conciliation "involves the reference of a dispute to a commission of persons whose task is to find the facts and make a report containing recommendations for a settlement, which each party to the dispute remains free to accept or reject as it chooses, without legal obligation and without obloquy for failure to comply with the recommendations". W. Bishop (*supra*, note 130), at p. 59.

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advancement of peace which embodied the so-called 'Bryan peace plan', concluded by the United States in 1913 and 1914. 144/ These "Bryan treaties", 48 of which were eventually concluded, called for the establishment of international commissions of inquiry and permanent commissions. 145/ Brierly explains that the "method of the 'Bryan treaties' was extensively adopted in later developments of international organization, and as it is essentially different from the method of arbitration on the one hand, and not precisely the same as that of mediation on the other, it is convenient to refer to it as 'conciliation'". 146/

53. One commentator has observed that: "The use of good offices and mediation of the World Bank which stretched [sic] over a period of more than 9 years in [the] case of [the] Indus Water Dispute between India and Pakistan and which were wound up successfully through the conclusion of the Indus Water Treaty ... represents the most striking recent illustration of the utilization of these methods specifically for settlement of an international water law dispute." 147/ The same author identifies five treaties in which "states have expressly accepted 'good offices' and 'mediation' as methods of settlement of water law disputes", 148/ and an additional 68 agreements that entrust joint commissions with functions of conciliation. 149/

144/ G. Hackworth, Digest of International Law, vol. 6 (1943), p. 5. See also the discussion of the Bryan treaties in the 1964 report of the Secretary-General (supra, note 140), at paras. 62-78.

145/ See Brierly (supra, note 138), at pp. 374-376; and W. Bishop (supra, note 130) at p. 59.

146/ J. Brierly (supra, note 138, at pp. 374-375. The numerous agreements concluded between the two World Wars that provided for conciliation are reviewed in United Nations, Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948 (1948); and Habicht, Post-War Treaties for the Pacific Settlement of International Disputes (1931). See also the 1964 report of the Secretary-General on methods of fact-finding (supra, note 140), at pp. 29-33.

147/ Chauhan (supra, note 126), at p. 325. Other such efforts have met with varying success. The United Nations Economic Commission for the Far East and Asia (ECAFE) was able to achieve positive results in the case of the Lower Mekong River, as was the President of the United States in the Tacna-Arica dispute between Chile and Peru; however, the efforts of a United States mediator, Mr. Eric Johnston, to achieve agreement among Syria, Lebanon, Jordan and Israel on the use of the Jordan River ultimately came to naught. See Sewell and White, "The Lower Mekong", Int'l Conciliation (New York), No. 358 (May 1966), p. 7; concerning the Tacna-Arica dispute, American Journal of International Law, vol. 23, Supp. (1929), p. 183; and with regard to the Jordan dispute, Doherty (supra, note 129).

148/ Ibid., at p. 326.

149/ Ibid., at pp. 331-339.

54. Arbitration contrasts with the foregoing methods in that it involves the application of rules of international law to the facts of the case and leads to a binding settlement of a dispute. Article 37 of the 1907 Hague Convention provides that "International arbitration has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the award." International arbitration has a long history, which "can be traced as far back as ancient Greece, and its use as a means of peaceful settlement was frequent even during the Middle Ages." ^{150/} It differs from adjudication chiefly in that the parties to an arbitration "must agree upon the constitution of the tribunal and the procedure which it will employ", while adjudication entails bringing a dispute "before an existing tribunal operating under an established procedure." ^{151/}

55. Most of the widely reported cases involving international watercourse disputes have been arbitrations. Perhaps the best known of these is the 1957 Lake Lanoux arbitration (France-Spain), ^{152/} but the 1968 Gut Dam arbitration (Canada-United States) ^{153/} has also received significant attention. ^{154/} Also noteworthy are the arbitral awards in the Helmand River delta case (Afghanistan-Persia), ^{155/} the San

^{150/} L. Henkin, R. Pugh, O. Schacter & H. Smit, International Law (2nd ed. (1987)), p. 589. See also Ralston, International Arbitration from Athens to Locarno, pp. 153-189 (1929).

^{151/} W. Bishop (supra, note 130), at pp. 60-61.

^{152/} Reports of International Arbitral awards, vol. 12, pp. 285-317; summarized in Yearbook ... 1974, vol. II (Part Two), pp. 194-199, document A/5409, paras. 1055-1068. This case is discussed in the second report (supra, note 134), at p. 116, paras. 111-124; and in the fourth report, A/CN.4/412/Add.1, para. 84.

^{153/} Decisions of 15 January 1968, 12 February 1968, and 27 September 1968. The case involved Canada and the United States and concerned claims by United States citizens for flooding and erosion damage allegedly caused by the Gut Dam. The report of the Agent of the United States before the Lake Ontario Claims Tribunal, containing excerpts of the decisions, is reprinted in International Legal Materials, vol. 8, p. 118 (1969). See the discussion of this case in the fourth report, A/CN.4/412/Add.1, pp. 54-55, para. 86; and in the fifth report (supra, note 134), p. 17, paras. 91-99.

^{154/} See the discussion of this case in Handl, "State liability for accidental transnational environmental damage by private persons", American Journal of International Law, vol. 74, p. 525, at p. 538 (1980); and in J. Schneider, World Public Order of the Environment: Towards an International Ecological Law and Organization, p. 165 (1979).

^{155/} See Yearbook ... 1974, vol. II (Part Two), p. 188, document A/5409, paras. 1034-1037.

Juan River case (Costa Rica-Nicaragua, 156/ the Kusk River case (Great Britain-Russia), 157/ and the Faber case (Germany-Venezuela). 158/ The two international judicial decisions involving watercourse disputes are the River Oder case 159/ and the case concerning the Diversion of Water from the Meuse (Belgium, the Netherlands), 160/ both decided by the Permanent Court of International Justice in the first half of the present century. Chauhan lists 116 agreements in which the parties have expressly agreed to resolve water-related disputes by recourse to arbitration, 161/ and 46 that contain similar provisions concerning judicial settlement. 162/

56. The modest objective of the foregoing survey has merely been to recall that there is a variety of procedures available to States wishing to clarify facts, adjust their relations, or to avoid or settle disputes. The following section of this chapter reviews illustrations of the use of certain of these procedures in State practice relating to the avoidance and settlement of international watercourse and other disputes.

156/ Ibid., p. 190, paras. 1038-1041.

157/ Ibid., p. 191, paras. 1042-1046.

158/ Ibid., p. 192, paras. 1047-1048.

159/ Case concerning the Territorial Jurisdiction of the International Commission of the River Oder, judgment of 10 September 1929, P.C.I.J., Ser. A., No. 23, [1929]. The parties to the case were, on the one hand, Poland, and on the other, the rest of the members of the River Oder Commission, viz., Czechoslovakia, Denmark, France, Germany, Great Britain and Sweden. The case is discussed in the second report (supra, note 134), p. 113, document A/CN.4/399, paras. 102-105.

160/ Judgment of 28 June 1937, P.C.I.J., Ser. A/B. No. 70, [1937]; summarized in Yearbook ... 1974, vol. II (Part Two), p. 187, document A/5409, para. 1022; and discussed in the second report (supra, note 134), at p. 114, paras. 106 and 107.

161/ Chauhan (supra, note 126), at pp. 344-355. See also Clagett, "Survey of agreements providing for third-party resolution of international waters disputes", American Journal of International Law, vol. 55 (1961), p. 645: "The survey shows that disputes regarding the regulation and use of a very high proportion of the international (boundary and successive) watercourses of the world are covered by formal agreements providing for compulsory adjudication or other third-party determination. ... [A]t least sixty-six states have made such commitments with one or more co-riparian states." (Ibid., at p. 646 (footnote omitted).) Clagett's survey, published in 1961, covers both watercourse agreements and general dispute-settlement treaties. (Ibid.)

162/ Ibid., at pp. 361-366. See also the passage quoted from Clagett in footnote 161 above.

C. Recourse to expert advice

57. As indicated in the introduction to this chapter, the Special Rapporteur has concluded on the basis of his study of State practice in this field that international watercourse disputes can often be most effectively avoided or resolved by referring questions to experts for investigation and report. In this section of the report, the Special Rapporteur will offer selected illustrations of the practice of States and international organizations in this regard. With a view to providing the Commission with a broad range of possible models, the Special Rapporteur has not confined the following brief survey to practice under agreements concerning international watercourses.

58. As noted in chapter I of the present report, a technique for the resolution of international watercourse-related questions that has proved successful is the reference of such matters to joint institutions established by the parties. Provisions for referrals of this kind may be found in a number of international watercourse agreements, 163/ such as the 1960 Indus Waters Treaty between India and Pakistan 164/ and the 1909 Boundary Waters Treaty between Canada and the United States. 165/ Practice under such arrangements has demonstrated the value of attempting in the first instance to resolve questions at the technical level.

59. The use of joint institutions to assist watercourse States in resolving questions concerning international watercourses has proved particularly successful under the 1909 Boundary Waters Treaty. 166/ When the parties refer a question to the International Joint Commission (IJC) under article IX of that agreement, the IJC generally establishes a board of experts to undertake a technical assessment of

163/ See note 149, supra, and accompanying text.

164/ Legislative Texts ..., Treaty No. 98, p. 300. See the provisions of this agreement quoted in text at note 48, supra, especially article VIII, para. (4).

165/ Legislative Texts ..., Treaty No. 79, p. 260. See the provision of this agreement quoted in text at note 50, supra, especially articles VIII-X.

166/ The importance of fact-finding and value of the work of technical experts in avoiding and resolving international watercourse disputes have been stressed by Mr. Blair Seaborn, former Canadian Chairman of the International Joint Commission. Remarks of J. Blair Seaborn at panel discussion on "Transfrontier Environmental Damage", Annual Meeting of the American Society of International Law, March 28, 1990.

the situation. ^{167/} These boards may, in turn, set up technical committees to assist them in their work.

60. This practice was followed, for example, in the case of a proposed coal mine on Cabin Creek, a tributary of the Flathead River. The Flathead flows from the Canadian Province of British Columbia into the state of Montana in the United States, where it forms the western boundary of Glacier National Park. That Park "is considered an important wilderness recreation and natural heritage area, subject to several 'special' designations such as UNESCO International Biosphere Reserve status and nomination as a World Heritage Site." ^{168/} In 1984 and 1985, the IJC was requested by the United States and Canada "to examine and report on the water quality and quantity of the Flathead River, with respect to the transboundary water quality and quantity implications of the proposed coal mine on Cabin Creek ..." ^{169/}

61. In order to respond to this request, "the Commission established a study board, the Flathead River International Study Board, to undertake a technical assessment as a basis for the Commission's deliberations. This Board included experts of various disciplines, and consisted of an equal number of members from the United States and Canada." ^{170/} The IJC reported that, "[a]fter more than three years of determined work and consensus building, the Board forwarded a number of reports to the Commission", ^{171/} and that "[t]hese reports form[ed] an important technical basis for the Commission's assessment of the matter." ^{172/} Relying upon the findings of the Study Board, the IJC recommended that:

^{167/} "The Commission does not maintain a large technical staff but depends largely on its boards and committees to carry out its functions. Governments have empowered it to select and use the most experienced and competent people in both countries on its boards. Engineers, scientists, and others, usually from government agencies, are organized into international boards to carry out the required technical studies and field work in connection with study References, and in the case of Orders of Approval to monitor compliance with the Orders.

"The Commission is assisted in its work by a variety of advisory boards, study boards, and control boards." International Joint Commission, 1983-1984 Activities Report, p. 8.

^{168/} International Joint Commission, Impacts of a Proposed Coal Mine in the Flathead River Basin, December 1988, p. 6 (hereafter referred to as Flathead Report).

^{169/} Ibid., p. 3.

^{170/} Ibid.

^{171/} Ibid., p. 4. These reports are summarized in a report of the Board included in the IJC's report (ibid.) as appendix B.

^{172/} Ibid.

"in order that Governments can ensure that the provisions of article IV of the Boundary Waters Treaty 173/ are honoured in the matter of the proposed coal mine at Cabin Creek in British Columbia:

- (1) the mine proposal as presently defined and understood not be approved;
- (2) the mine proposal not receive regulatory approval in the future unless and until it can be demonstrated that:
 - (a) the potential transboundary impacts identified in the report of the Flathead River International Study Board have been determined with reasonable certainty and would constitute a level of risk acceptable to both Governments; and,
 - (b) the potential impacts on the sport fish populations and habitat in the Flathead River system would not occur or could be fully mitigated in an effective and assured manner; and
- (3) the Governments consider, with the appropriate jurisdictions, opportunities for defining and implementing compatible, equitable and sustainable development activities and management strategies in the upper Flathead River basin." 174/

62. The International Joint Commission has followed similar procedures in other cases. 175/ This practice of Canada and the United States illustrates clearly the value of initially referring questions to experts for fact-finding and reporting on technical matters. As in the Flathead River case, a consensus as to such questions may be reached more readily by experts than would have been the case had the same questions been taken up initially on the diplomatic level. The report of the expert group may then form the basis of an agreed resolution of the question

173/ Article IV provides that boundary waters "shall not be polluted on either side to the injury of health or property on the other".

174/ Flathead Report (supra, note 168), at p. 11.

175/ See, e.g., the procedures followed by the IJC with regard to questions referred to it concerning the following boundary watercourses: the Skagit River (Ross Dam), ICJ, 1983-1984 Activities Report, p. 10; the Poplar River, IJC, Report to December 1982, p. 17, and fourth report, A/CN.4/412/Add.1, para. 87, at p. 56; Richelieu River-Lake Champlain, IJC, Report to December 1982, p. 18; Osoyoos Lake (ibid.), p. 19; the St. Croix River (ibid.), p. 20, IJC, Activities Report 1985, p. 16, IJC, Activities Report 1986, p. 13 and IJC, Activities 1987-1988, p. 24; St. Mary's Rapids, IJC, Activities Report 1985, p. 13; Lake of the Woods and Rainy Lake, IJC, Activities Report 1986, p. 13, and IJC, Activities 1987-1988, p. 24; and, of course, the Great Lakes, which are addressed in virtually every report prepared by the IJC. See also Professor Bourne's discussion of the role played by the IJC with regard to the Columbia River dispute. Bourne, ("Mediation ..."), (supra, note 125), at pp. 119-122.

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between the watercourse States involved. These considerations may also have inspired the framers of the 1960 Indus Waters Treaty which, as noted above establishes institutions and procedures akin to those provided for in the 1909 Boundary Waters Treaty.

63. Article VIII of the Indus Waters Treaty between India and Pakistan ^{176/} calls for the establishment of a Permanent Indus Commission ^{177/} consisting of one Commissioner from each State. The Commissioners are to be "high-ranking engineer[s] competent in the field of hydrology and water-use". The Commission is much more than a forum for the settlement of disputes; the Commissioners represent their respective Governments with regard to all matters arising out of the Treaty, and "serve as the regular channel of communication on all matters relating to the implementation of the Treaty ..." ^{178/}

64. Article IX of the Treaty is entitled "Settlement of differences and disputes". It provides that the Commission shall endeavour to resolve "[a]ny question which arises between the Parties concerning the interpretation or application of this Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty ..." ^{179/} If the Commission cannot resolve the question, a "difference" is deemed to have arisen. ^{180/} Either Commissioner may then refer the matter to the Neutral Expert under the provisions of annexure F of the Treaty, providing that the issue, in the opinion of the Commissioner making the referral, falls within one of the 23 categories set forth in that annexure. The Neutral Expert is to be a highly qualified engineer. ^{181/}

65. A "dispute" is deemed to have arisen only if the question does not pertain to one of the 23 categories set forth in annexure F or if the Neutral Expert decides

^{176/} Legislative Texts ..., Treaty No. 98, p. 300. See the provisions of this agreement quoted in text at note 48, *supra*, especially article VIII, para. (4). See also the discussion of the Treaty and, in particular, its provisions of present interest, in R. Baxter, "The Indus Basin", in The Law of International Drainage Basins (A. Garretson, R. Hayton and C. Olmstead, contributors and editors 1967), p. 442, at pp. 471 *et seq.*

^{177/} The late Judge Baxter has surmised that "the Indus Commission was inspired by the International Joint Commission, United States-Canada" (*ibid.*, at p. 471).

^{178/} *Ibid.*, article VIII, paragraph (1).

^{179/} *Ibid.*, article IX, paragraph (1).

^{180/} *Ibid.*, article IX, paragraph (2).

^{181/} *Ibid.*, annexure F, paragraph 4.

that the "difference" should be treated as a "dispute". ^{182/} "Disputes" are to be dealt with in accordance with paragraphs 3 to 5 of article IX. These paragraphs provide for the parties to enter into negotiations on the basis of a report submitted to them by the Commission and, if they so agree, to appoint mediators to assist them. ^{183/} The dispute may be referred to a court of arbitration, established in accordance with annexure G of the Treaty, if the parties agree to do so, or upon the request of either party on the ground that the dispute is not likely to be resolved by negotiation or mediation, or that the other party is unduly delaying the negotiations. ^{184/}

66. The procedures envisaged under the Indus Waters Treaty thus consist of a series of stages, beginning - as is the case with the 1909 Boundary Waters Treaty - with efforts to resolve questions within the Commission, a body composed of experts in the field. The next phase of the process also involves an expert, in this case a neutral one. Negotiations, and ultimately arbitration, are envisaged only as a last resort.

67. A third agreement of present interest also relies heavily upon experts to resolve questions concerning its interpretation or application. While it does not concern international watercourses, the International Plant Protection Convention of 6 December 1951 ^{185/} contains provisions concerning dispute settlement that are worthy of consideration by the Commission. The purpose of the Convention, according to article I, is to secure "common and effective action to prevent the introduction and spread of pests and diseases of plants and plant products and to promote measures for their control ..." ^{186/} Article IX, entitled "Settlement of disputes", provides as follows:

"1. If there is any dispute regarding the interpretation or application of this Convention, or if a contracting Government considers that any action by another contracting Government is in conflict with the obligations of the latter under [certain articles] of this Convention, ... the Government or Governments concerned may request the Director-General of FAO to appoint a committee to consider the question in dispute.

2. The Director-General of FAO shall thereupon, after consultation with the Governments concerned, appoint a committee of experts which shall include representatives of those Governments. This committee shall consider the question in dispute, taking into account all documents and other forms of

^{182/} *Ibid.*, article IX, paragraph (2) (b).

^{183/} *Ibid.*, article IX, paragraph (4).

^{184/} *Ibid.*, article IX, paragraph (5).

^{185/} United Nations, *Treaty Series*, vol. 50, p. 67.

^{186/} *Ibid.*, article I, paragraph 1.

evidence submitted by the Governments concerned. This committee shall submit a report to the Director-General of FAO who shall transmit it to the Governments concerned, and to other contracting Governments.

3. The contracting Governments agree that the recommendations of such a committee, while not binding in character, will become the basis for renewed consideration by the Governments concerned of the matter out of which the disagreement arose.

4. The Governments concerned shall share equally the expenses of the experts." 187/

68. This approach utilizes a third party, the Director-General of the Food and Agriculture Organization of the United Nations (FAO), rather than a standing commission, to constitute the group of experts. Such an approach is also conceivable in the context of international watercourses and might be given consideration by the Commission. In the case of the present draft articles, the third party could be the Director-General of FAO, who could draw upon experience under the International Plant Protection Convention; the Director-General of the United Nations Environment Programme; the Secretary-General of the United Nations; or another neutral individual or organization.

69. A second point worthy of note is that article IX of the International Plant Protection Convention, which embodies the entire dispute-resolution process, does not envisage ultimate recourse to binding arbitration or adjudication. Instead, a non-binding report containing recommendations is transmitted to the parties concerned, and to the other parties to the Convention. The parties to the dispute are then to give "renewed consideration" to the matter giving rise to the disagreement on the basis of the recommendations of the expert committee. This approach could encourage States to have recourse to the procedure, since it does not result in a binding decision. At the same time, it could provide some incentive to the States involved to resolve their differences on the basis of the committee's recommendations. The incentive would derive not only from the parties' undertakings in paragraph 3, but also from the fact that the committee's recommendations would have been brought to the attention of the Director-General and the other contracting parties. A similar system is employed by the parties to the General Agreement on Tariffs and Trade (GATT).

70. Some 96 States are parties to the General Agreement on Tariffs and Trade, 188/ an agreement concerning international economic relations which contains commitments of most-favoured-nation treatment, non-discrimination, and other important undertakings relating to trade between the contracting parties. The GATT addresses

187/ Ibid., article IX.

188/ United Nations, Treaty Series, vol. 55, p. 194; GATT, Basic Instruments and Selected Documents (BISD), vol. IV, March 1969.

dispute settlement in its articles XXII and XXIII. The procedures contained in these articles have been "improved and refined" in a subsequent Understanding adopted by the parties to the GATT on 28 November 1979. 189/

71. Article XXII of the GATT calls for parties to "accord sympathetic consideration to, and ... afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement." 190/ That article also provides that if it has not been possible to find a satisfactory solution to any matter through consultation, a party may request that the parties to the GATT, acting jointly (referred to hereinafter as the "Contracting Parties" 191/), "consult with any contracting party or parties" with regard to such matter.

72. Article XXIII, paragraph 2, provides for conciliation of any differences between the parties that have not been settled bilaterally. Specifically, a party may refer the question to the Contracting Parties, which are to investigate it and "make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate." 192/ In practice, parties to a dispute have generally requested that a panel of experts be established to investigate and report on the matter. GATT panels are composed of three to five individuals who are selected by the Director-General of GATT 193/ and who serve in their individual capacities. 194/ While panel members may not be nationals of a party to the dispute they have, in the past, generally been

189/ See Understanding regarding notification, consultation, dispute settlement and surveillance, decision adopted by the Contracting Parties on 28 November 1979 (GATT, BISD, twenty-sixth supplement, p. 210 (1980)).

190/ GATT (supra, note 188), article XXII, paragraph 1.

191/ GATT (supra, note 188), article XXV, paragraph 1. While the GATT itself uses full capitals to indicate that the contracting parties are acting jointly ("CONTRACTING PARTIES"), the 1979 Understanding uses initial capitals only. The latter form has been adopted in the present report.

192/ Ibid., article XXIII, paragraph 2.

193/ The 1979 Understanding (supra, note 189) provides in its paragraph 13 that, "to facilitate the constitution of panels, the Director-General should maintain an informal indicative list of governmental and non-governmental organizations persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels."

194/ See the 1979 Understanding (ibid., paragraph 14). In particular, that paragraph provides that "[p]anel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience."

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government representatives. ^{195/} However, experts who are not government representatives are increasingly being called upon to serve on panels, owing in part to the increase in recourse to GATT dispute-settlement procedures and the resulting need to enlarge the pool of experts.

73. According to the 1979 Understanding, "a panel should make an objective assessment of the matters before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement ... [and] should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution." ^{196/} Indeed, encouraging the parties to develop a mutually satisfactory solution is the basic object of the GATT dispute-settlement procedures. The panel is to submit its report first to the parties concerned and then to the Contracting Parties. The latter, acting through the GATT Council, normally adopt the report of the panel, making recommendations or rulings as appropriate. The Contracting Parties then "keep under surveillance any matter on which they have made recommendations or given rulings". ^{197/}

74. Paragraph 2 of article XXIII further provides that where the Contracting Parties

"consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances." ^{198/}

Such "retaliatory" measures have, however, been authorized only once in the history of the GATT. ^{199/} Panel reports are generally accepted by the parties to the dispute or serve as the basis for a negotiated settlement.

75. Like the agreements reviewed previously in this section, the GATT dispute-settlement procedures consist of a series of stages, or echelons, and rely heavily upon expert reports and recommendations. A feature of the GATT process that is unique among the instruments reviewed is the provision for the

^{195/} In fact, the 1979 Understanding provides in its paragraph 11 that "members of a panel would preferably be governmental".

^{196/} The 1979 Understanding (*supra*, note 189, paragraph 16).

^{197/} The 1979 Understanding (*ibid.*, paragraph 22).

^{198/} GATT (*supra*, note 189), article XXIII, paragraph 2. That paragraph goes on to provide that a party that is the object of responsive measures shall be free to withdraw from the Agreement on 60 days' notice.

^{199/} See BISD, Supplement No. 1 (dispute in 1952 between the Netherlands and the United States concerning United States quotas on dairy products).

Contracting Parties, acting jointly, to approve panel reports, make recommendations or rulings, and authorize enforcement measures. This use of what amounts to a conference-of-the-parties procedure ^{200/} lends added authority to the otherwise non-binding panel reports. While it does not go as far, the International Plant Protection Convention also strengthens the incentive to comply with expert committee reports through the means of informing all contracting parties of them.

76. Another agreement that should be mentioned here is the Geneva Convention relating to the Development of Hydraulic Power Affecting More than One State of 9 December 1923. ^{201/} This convention is the only instrument listed under the category of "General conventions concerned exclusively with the utilization and use of international rivers" in the 1974 report by the Secretary-General entitled "Legal problems relating to the utilization and use of international rivers". ^{202/} Article 12 of the Convention is entitled "Settlement of disputes". It provides in essence for referral of disputes to a technical body established by the League of Nations for an advisory opinion:

"If a dispute should arise between contracting States as to the application or interpretation of the Convention, and if such dispute cannot be settled either directly between the Parties or by some other amicable method of procedure, the Parties to the dispute may submit it for an advisory opinion to the body established by the League of Nations as the advisory and technical organization of the Members of the League in matters of communication and transit, unless they have decided or shall decide by mutual agreement to have recourse to some other advisory, arbitral or judicial procedure." ^{203/}

Thus the 1923 Geneva Convention, like other agreements reviewed in this section, provides for the submission of disputes to a group of experts for an objective, non-binding opinion. This confirms that even relatively early in this century, States recognized the importance of involving experts in the process of avoiding and resolving disputes concerning international watercourses.

77. A final item of interest in the present context, although it does not involve the practice of States, per se, is the procedure followed by the World Bank in its consideration of proposed projects on international waterways. After notification of the proposal is provided to other riparian States by the State proposing the

^{200/} Such a procedure is provided for in draft article 7 of annex I submitted in the present report.

^{201/} The correction entered into force 30 June 1925, League of Nations, Treaty Series, vol. 36, p. 77; Legislative Texts ..., Treaty No. 2; Yearbook ... 1974, vol. II (Part Two), p. 57, document A/5409, para. 68. According to the 1974 report of the Secretary-General, the Convention was ratified by 20 States and denounced by one. Yearbook ... 1974, ibid., note 53, at p. 60.

^{202/} Ibid.

^{203/} Ibid.

project or the Bank, the other States are given a period of time within which to respond. ^{204/} If these other States raise objections to the proposal, the Bank may seek an opinion from independent experts in appropriate cases. The experts do not have any decision-making role in the processing of the proposal but if their advice is sought, their report and conclusions are to be reviewed before the staff of the Bank makes a decision on whether to proceed further with the processing of the proposal. ^{205/}

78. Since many of the most significant international watercourse projects will involve World Bank financing, these procedures constitute a particularly important means of avoiding disputes between watercourse States with regard to proposed projects or, in the language employed in the present draft articles, planned measures. For the purposes of the present survey, it is therefore of interest to note that the procedures followed by the Bank in deciding on project proposals provide for the possibility of expert advice, presumably in recognition of the usefulness of the assistance of technical experts in structuring a solution to actual or potential conflicts over uses of international watercourses.

79. The particular value of standing, rather than ad hoc, expert bodies should not be lost sight of, however. Permanent joint commissions can form working relationships over time, build trust, establish effective lines of communications, and acquire more perspective and detailed knowledge of the characteristics and circumstances of the international watercourse system concerned than is possible in the case of an ad hoc body. This may mean the difference between success and failure in an individual case. For example, Professor Charles Bourne notes that non-acceptance by Afghanistan and Iran of the report of the Helmand River Delta Commission may be attributable in part to the composition of the commission (engineers from disinterested countries) and the short time taken to produce its report: ^{206/}

"Was the Commission, doubtless very efficient and sound from the engineering viewpoint, the sort of body with the training, the inclination and particularly the time to reconcile deepseated political differences? ... The experience of the Helmand River Delta Commission suggests that a permanent

^{204/} This notification and response procedure is strikingly similar to that which is embodied in part III of the Commission's draft articles on the present topic, entitled "Planned measures".

^{205/} World Bank Operational Manual, Operational Directive 7.50: Projects on International Waterways, 18 September 1990.

^{206/} Bourne (*supra*, note 125), at p. 122. The Commission was established by agreement between Afghanistan and Iran on 7 September 1950 and published its report in February 1951. See *Yearbook ... 1974*, vol. II (Part Two), p. 190, document A/5409, paras. 1036-1037.

joint commission composed of nationals of the co-basin states concerned may be a more effective instrument in reconciling differences." 207/

Further support for this conclusion may be found in the materials presented in chapter I of the present report concerning joint institutional management. 208/

80. The foregoing review of the practice of certain States and international organizations provides illustrations of methods for avoiding and resolving disputes that, in the judgement of the Special Rapporteur, are particularly well-suited to questions concerning the utilization and protection of international watercourses. This is so because the answers to such questions often depend upon the establishment of facts and the application of science and technology, and these processes can usually be carried out most effectively by experts. Some of the procedures employed in the agreements reviewed in this section will accordingly be adapted for use in the draft articles to be proposed later in this chapter. The draft articles also draw upon the work of international organizations in this field, which will be reviewed briefly in the following section.

D. The work of international organizations

81. As in the case of the other issues dealt with by the present draft articles, international organizations have made a valuable contribution to the codification and progressive development of the law and institutions in the field of the settlement of watercourse disputes. The United Nations Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development has emphasized the importance of examining questions concerning the utilization of international watercourses initially at the technical level. The Panel's report points out that the use of existing joint institutions for this purpose is particularly advantageous,

"because professionally qualified and experienced officers who are dealing on a day-to-day basis with international water resources problems and with their professional counterparts are in the best position to marshal and evaluate the extensive and complex factual data and to weigh the scientific, engineering and management considerations. ... Moreover, the influence of extraneous considerations, including political considerations where these are unrelated to the problem at hand, can best be minimized when substantial decision-making authority is delegated, at least in the first instance, to the experts directly involved. ... In this way, work on international water resources

207/ Bourne (supra, note 125), at p. 122.

208/ See also the conclusions of the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development, quoted in text at note 209, infra.

projects or programmes is least likely to be delayed or disrupted and the merits of the matter least likely to be distorted or misconstrued." 209/

This points to the importance of building "into the institutional relationships between or among system States the opportunity and procedures for avoidance of conflict ..." 210/

82. In its 1961 Salzburg resolution on the use of international non-maritime waters, 211/ the Institute of International Law addressed dispute settlement principally in the context of new works or uses. According to article 3, disagreements over the scope of rights of utilization are to be settled by States "on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances." Article 6 provides that in the event of an objection to a work or utilization, "the States will enter into negotiations with a view to reaching an agreement within a reasonable time." The article continues: "For this purpose, it is desirable that the States in disagreement should have recourse to technical experts and, should occasion arise, to commissions and appropriate agencies in order to arrive at solutions assuring the greatest advantage to all concerned." In article 8, the Institute recommends that States failing to reach agreement within a reasonable time submit the question to judicial settlement or arbitration. Finally, article 9 of the resolution provides as follows:

"It is recommended that States interested in particular hydrographic basins investigate the desirability of creating common organs for establishing plans of utilization designed to facilitate their economic development as well as to prevent and settle disputes which might arise."

209/ Management of international water resources (supra, note 3), at pp. 144-145, para. 457. The following observations of Professor Bourne concerning the Columbia River controversy involving Canada and the United States bear out the Panel's conclusions:

"[T]he history of the Columbia River dispute suggests that one of the valuable aspects of a joint commission is that it provides a forum where co-basin states may dispute each others [sic] claims vigorously without involving their governments at a high level. There was in fact no serious controversy about the Columbia River between the governments of Canada and of the United States. ... The issues were hammered out in the [International Joint] Commission and agreement was ultimately reached there on the principles that became the foundation of the 1961 Treaty."

Bourne ("Mediation ..."), (supra, note 128), at p. 122 (footnote omitted).

210/ S. Schwebel, third report (supra, note 2), p. 182, para. 474.

211/ Annuaire de l'Institut de droit international, vol. 49-II, Salzburg Session, September 1961 (Basle, 1961), pp. 381-384; reproduced in Yearbook ... 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076.

/...

Thus the Institute's resolution recognizes both the value of having recourse to expert advice and of establishing joint institutions for the management of international watercourses as well as for the avoidance and settlement of disputes.

83. The International Law Association addressed the subject of "Procedures for the prevention and settlement of disputes" in chapter 6 of the Helsinki Rules on the uses of the waters of international rivers. ^{212/} The chapter contains 12 articles, and applies to "all uses including navigation, timber-floating, and consumptive uses, of the waters of international drainage basins and to the pollution of such waters." ^{213/} It is supplemented by an annex, which implements article XXXIII, entitled "Model rules for the constitution of the conciliation commission for the settlement of a dispute". ^{214/} Since the articles have been set forth in extenso in an earlier report, ^{215/} they will merely be summarized here.

84. After recalling the obligation of Article 2, paragraph 3, of the Charter of the United Nations, the articles note the "primary obligation" of States to resort to means of dispute resolution contained in applicable treaties. ^{216/} There follows a set of recommended procedures designed to prevent disputes that, except for its non-binding nature, is very similar to the procedures contained in part III of the draft articles on the present topic adopted by the Commission. ^{217/} The ensuing six articles establish a graduated series of means of dispute resolution that are recommended to the parties. The ILA recommends that the concerned States first seek a solution by negotiation (article XXX) or by referring the question to a joint agency (article XXXI). If the dispute persists, the Helsinki Rules recommend that the parties seek the good offices or mediation of a third State, a qualified international organization or a qualified person (article XXXII). If these methods fail to resolve the dispute, it is recommended that the States concerned form a commission of inquiry or an ad hoc conciliation commission, the latter to be constituted as provided in the annex mentioned above (article XXXIII). Finally, it is recommended that the parties submit the dispute to an ad hoc or permanent arbitral tribunal or to the International Court of Justice in any of the following cases: if the parties are unable to form a commission; if a commission is formed but is not able to find a solution; if it does find a solution but its recommendation is not accepted by the parties; or if an agreement is not otherwise reached (article XXXIV).

^{212/} International Law Association, Report of the fifty-second Conference, Helsinki, 1966 (London, 1967), pp. 478-533, reprinted in Yearbook ... 1974, vol. II (Part Two), p. 357, document A/CN.4/274, para. 405.

^{213/} Ibid., first paragraph of comments to article XXVI, at p. 517.

^{214/} Ibid., at p. 531.

^{215/} S. Schwebel, third report (supra, note 2), at pp. 185-186, para. 494.

^{216/} Ibid., article XXVIII.

^{217/} Ibid., article XXIX.

85. The value of a procedural system involving several "echelons" for the resolution of watercourse disputes, as recommended in the Helsinki Rules, has been emphasized by expert studies 218/ and previous special rapporteurs. 219/ But it has been suggested that before they resort to third-party assistance, States should make every effort to resolve questions bilaterally. 220/ Specifically, they should provide for the possibility of "review" within joint institutions, or at least by professionals, of conclusions reached at lower levels. There is precedent in State treaty practice for such use of various echelons within the bilateral context. 221/ These considerations probably led two previous special rapporteurs to propose dispute-settlement procedures that entail a series of stages. Their proposals will be summarized in the following section.

E. Proposals of previous Special Rapporteurs

86. In his third report, Judge Schwebel submitted an article entitled "Principles and procedures for the avoidance and settlement of disputes". 222/ The article begins by stating the obligation of States to settle disputes peacefully (paragraph 1), and proceeds to set forth a number of substantive principles that are to govern the resolution of differences and disputes (paragraph 2). The States concerned are then called upon to use their best efforts to adjust their differences with a view to avoiding the emergence of disputes (paragraph 3). If

218/ See generally Management of international water resources (supra, note 3), chapter V, "Accommodation procedures and dispute settlement", para. 455.

219/ See S. Schwebel, third report (supra, note 2), at p. 182, paras. 478-479.

220/ See S. Schwebel (ibid.); Management of international water resources (supra, note 3), chapter V; and the discussion of the Helmand River Delta Commission case, text at note 207, supra.

221/ The practice of the International Joint Commission, Canada and the United States, discussed earlier in this report, in effect permits this kind of review: reports of technical "boards" are forwarded to the Commission for its action. Cf. also the 1955 Convention between Italy and Switzerland concerning the regulation of Lake Lugano (United Nations, Treaty Series, vol. 346, p. 212), providing in article VI for the establishment of a Joint Supervisory Commission; and review authority granted the Supreme Frontier Water Commission in respect of action by the Frontier Water Commission, in the 1922 Agreement between Denmark and Germany relating to watercourses and dikes on the German-Danish frontier, articles 2 and 3 (League of Nations, Treaty Series, vol. X, p. 200), summarized in Yearbook ... 1974, vol. II (Part Two), p. 127, document A/5409, para. 556, at para. 558. (Interestingly, decisions on regulations for the upkeep of frontier waters adopted unanimously by the Frontier Water Commission are not subject to appeal (ibid., article 6).)

222/ S. Schwebel, third report (supra, note 2), at p. 186, para. 497.

consultations and negotiations fail to produce a solution within a reasonable period, any of the concerned States may "call for the creation of an international commission of inquiry to investigate and report upon the facts relevant to the unresolved difference" (paragraph 4(a)). However, another State may delay the establishment of such a commission by up to six months by "convok[ing] a special period of intensified negotiations ..." (paragraph 4(b)).

87. If an international commission of inquiry is constituted, its report is to form the basis of renewed negotiations between the concerned States, which are to "endeavour to arrive at a just and equitable resolution of the difference" (paragraph 4(d)). In the event that the States are unable to resolve the difference through these negotiations within six months, the matter may be referred to conciliation (paragraph 4(e)). Finally, if conciliation fails to resolve the matter, and unless there is an applicable and binding agreement to arbitrate or adjudicate disputes between the States concerned, any of the States concerned may "declare the matter to be an international dispute and call for arbitration or adjudication of the dispute in accordance with the optional procedures annexed to these articles" (paragraph 4(f)).

88. The first report of Judge Evensen contains a separate chapter on the "Settlement of disputes", comprising eight articles. ^{223/} The first article enjoins States to settle disputes by peaceful means and to "seek solutions by the means indicated in Article 33, paragraph 1, of the Charter" (article 31, paragraph 1). It goes on to preserve the effect of any separate agreement for the settlement of disputes (article 31, paragraph 2). The first stage of dispute settlement provided for under Judge Evensen's articles entails consultations and negotiations, aimed at "arriving at a fair and equitable solution to the dispute" (article 32, paragraph 1). The concerned States may conduct consultations and negotiations directly, through any pre-existing joint management commission, or through "other regional or international organs or agencies agreed upon between the parties" (article 32, paragraph 2). The States concerned may "establish a board of inquiry of qualified experts for the purpose of establishing the relevant facts ... in order to facilitate the consultations and negotiations ..." (article 33, paragraph 1). The concerned States may also by agreement request mediation by a third party to assist them with their consultations and negotiations (article 33, paragraph 2).

89. The next stage provided for is conciliation, which may be resorted to by agreement of the parties to the dispute (article 34). Judge Evensen's articles set forth procedures for composing a conciliation commission (article 34, paragraphs 2-4), the functions and tasks of the commission (article 35), effects of the commission's report and the manner in which costs of the commission are to be shared (article 36). The final stage of dispute resolution is "adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal" (article 37). This stage is to be resorted to by agreement (article 37), and a decision of one of the named bodies is binding and final (article 38).

^{223/} Yearbook ... 1983, vol. II (Part One), p. 190 (*supra*, note 2).

90. The Special Rapporteur believes that the Commission could profitably consider either of the systems of dispute resolution proposed by Judges Schwebel and Evensen. However, he would be inclined not to include either substantive principles and rules, 224/ or procedures for establishing commissions or other bodies and rules governing their functions 225/ in the provisions on dispute resolution themselves. In the view of the Special Rapporteur, the latter are matters of detail that are best left to any conference at which the present draft articles may be considered. The proposals of Judge Evensen in this regard will, of course, provide a valuable basis from which to proceed. The basic approaches of the two sets of provisions are believed to be sound, however, and will accordingly be drawn upon heavily in the draft articles proposed in the following section.

224/ Cf. paragraph 2 of article 16 proposed by Judge Schwebel.

225/ See articles 34 and 35 as proposed by Judge Evensen.

F. Proposed annex on fact-finding and settlement of disputes

ANNEX II

FACT-FINDING AND SETTLEMENT OF DISPUTES

Part A

Fact-finding

Article 1

Fact-finding

1. Fact-finding shall be undertaken at the request of any watercourse State for the purpose of establishing facts necessary to the fulfillment of the obligations of watercourse States under the present draft articles.

2. The fact-finding referred to in paragraph 1 may be conducted by a competent joint organization established by the watercourse States or, in the absence thereof, by an ad hoc expert commission established by agreement of the watercourse States concerned.

3. In the absence of a joint organization competent to conduct fact-finding, and if the watercourse States concerned are unable to agree upon the establishment of an ad hoc expert commission within six months of the initial request for fact-finding, they shall establish a commission of inquiry at the request of any of them in accordance with the procedures contained in annex X.

4. The commission of inquiry shall determine its own procedure, the place or places where it shall sit and all other administrative matters.

5. Watercourse States shall furnish any body conducting fact-finding pursuant to the present draft article with all the means and facilities required for its investigation and report. In particular, they shall grant it free access to their territories for the purpose of carrying out its task.

Comments

(1) Article 1 of the present annex provides for fact-finding, that is, the establishment of factual information necessary to permit the watercourse States to fulfil their obligations under the draft articles. In contrast to the approaches followed by previous special rapporteurs, this article is contained in a separate part of the present annex because its applicability is not restricted to cases in

/...

which a "dispute" 226/ has arisen. Indeed, it is envisaged that the availability to watercourse States of fact-finding machinery will often prevent disputes from arising by eliminating any questions as to the nature of the relevant facts.

(2) As noted earlier in this chapter, fact-finding as a means of maintaining international peace and security has received considerable attention of late in the context of the work of the Special Committee on the Charter. 227/ A working paper submitted to the Special Committee by Belgium, Czechoslovakia, the German Democratic Republic, the Federal Republic of Germany, Italy, Japan, New Zealand and Spain, entitled "Fact-finding by the United Nations in the field of the maintenance of international peace and security" defines fact-finding, for the purpose of that paper, as follows: "any activity designed to ascertain facts which the competent United Nations organs need to exercise effectively their functions in the field of the maintenance of international peace and security." 228/ The working paper states that "[f]act finding should be comprehensive, objective and impartial" 229/ and that "[f]act-finding missions should perform their task in an impartial way. Their members shall not seek or receive instructions from any Government or from any authority other than the competent United Nations organ." 230/ According to the working paper, "the purpose of fact-finding missions should be to gain objective and detailed knowledge of the facts". 231/ Further, the decision "to

226/ The obligation of Members of the United Nations to settle their differences by peaceful means under Article 2, paragraph 3, of the Charter applies only to "disputes"; other kinds of disagreements or questions are not governed by this provision, though they may be subject to other rules of international law. In the Mavrommatis Palestine Concessions case (Greece v. Great Britain) (Jurisdiction), the Permanent Court of International Justice, in determining whether it had jurisdiction under article 26 of the Palestine Mandate, defined the term "dispute" as follows: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons". [1924] P.C.I.J. Ser. A, No. 2, at pp. 11-12 (1934). For other cases concerning the concept of a "dispute", see, e.g., Electricity Company of Sofia, [1939] P.C.I.J. Ser. A/B, No. 77, 64, 83; Northern Cameroons case, I.C.J. Reports 1963, pp. 33 and 34; and the Nuclear Tests cases, I.C.J. Reports 1974, pp. 260, 270 and 271.

227/ See, e.g., Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*supra*, note 127). See also the statement of the Rapporteur, especially the addendum, document A/AC.182/1990/CRP.3/Add.1, 22 February 1990; and the 1964 Report of the Secretary-General on methods of fact-finding (*supra*, note 140).

228/ Document A/AC.182/L.66, 26 February 1990, p. 1, paragraph 2.

229/ *Ibid.*, paragraph 3.

230/ *Ibid.*, paragraph 25.

231/ *Ibid.*, paragraph 5.

undertake fact-finding should always contain a clear mandate and precise requirements for the report. The report should be limited to a statement of facts." ^{232/} The working paper recommends that fact-finding missions "enjoy all freedoms and facilities needed for discharging their mandate", ^{233/} as well as "the privileges and immunities specified in the Convention on the Privileges and Immunities of the United Nations." ^{234/} Finally, the working paper recommends that the Secretary-General be "encouraged to prepare and update lists of experts in various fields so as to have them available at any time for fact-finding missions. He should also maintain and develop, within existing resources, capabilities for the event of emergency fact-finding missions." ^{235/}

(3) As indicated in paragraph 1 of these comments, article 1 is intended to be applicable even where no "dispute" has yet arisen between watercourse States; it follows that it would be applicable well before there was any threat to international peace and security. However, all the other features identified in the preceding paragraph are applicable, mutatis mutandis, in the case of fact-finding under the present draft articles.

(4) Paragraph 1 provides for the right of any watercourse State to request fact-finding. As discussed earlier in this report, this process may be necessary to establish factual foundations for the application of the legal rules contained in the draft articles.

(5) The watercourse States making the request for fact-finding under paragraph 1 could be restricted to those that are affected by the fact or facts sought to be established. But such a requirement could itself give rise to questions as to whether the requesting State was indeed "affected" by the question of fact involved. In order to avoid this problem, and since it would be unusual for non-affected watercourse States to make such requests in any event, the Special Rapporteur decided not to introduce such an additional requirement.

(6) Paragraphs 2 through 5 deal with the body that will undertake the fact-finding requested pursuant to paragraph 1. They provide that the inquiry may be performed by a joint organization that has been established by the watercourse States concerned (as envisaged under article 26, set forth earlier in the present report), so long as this body is competent under its constituent instrument to carry out such functions. Failing such a competent joint organization, fact-finding is to be conducted by an ad hoc commission of experts established by agreement of the watercourse States concerned. As in the case of the schematic outline being followed by the Commission in its work on international liability for injurious consequences arising out of acts not prohibited by international law, the

^{232/} Ibid., paragraph 12.

^{233/} Ibid., paragraph 22.

^{234/} Ibid., paragraph 23.

^{235/} Ibid., paragraph 30.

States concerned have "the duty to co-operate in good faith to reach agreement ... upon the arrangements for and terms of reference of the inquiry, and upon the establishment of the fact-finding machinery. [The] States shall furnish the inquiry with all relevant and available information." ^{236/} Under the present draft articles, the specific source of the duty of watercourse States to co-operate in fulfilling their obligations under the draft articles, including the establishment of relevant facts, is article 9, "General obligation to co-operate".

(7) Paragraph 3 provides for the establishment of a commission of inquiry at the request of any watercourse State concerned. Such a commission is to be constituted only in the event that there is no competent joint organization and the parties are unable to agree upon the establishment of an ad hoc expert commission within six months of the initial request for fact-finding. The procedures for the establishment of the commission of inquiry are not included in the article for reasons explained earlier. Such procedures, however, could be envisaged along the following lines:

Annex X

Procedures for establishing Commissions of Inquiry

1. A commission of inquiry shall be composed of three members: one appointed by the requesting watercourse State or States, one appointed by the other concerned watercourse State or States and the third member, who shall serve as president, chosen by the parties jointly. The appointments shall be made within two months of the request for the establishment of the commission of inquiry.
2. If no agreement is reached on the choice of president within four months of the request for the establishment of the commission of inquiry, any party may request the Secretary-General of the United Nations to appoint the president.
3. If one of the appointments provided for in paragraph 1 of the present draft article is not made within the stipulated period, the president shall, at the request of any party, constitute a single-member commission of inquiry.

The foregoing provisions were inspired in part by articles XIV-XVI of the Convention on International Liability for Damage Caused by Space Objects of

^{236/} The schematic outline is contained, inter alia, in Quentin-Baxter, fourth report on international liability for injurious consequences arising out of acts not prohibited by international law, Yearbook ... 1983, vol. II (Part One), p. 223, document A/CN.4/373, annex. The quoted language is from paragraph 5 of section 2 (ibid.), at p. 224.

29 March 1972. 237/ Article XVI of that Convention contains procedures for the filling of vacancies. A similar set of procedures could be added to the present draft article if it were believed to be necessary.

(8) Paragraph 4 reflects the usual principle that commissions of inquiry and conciliation commissions are to determine their own rules of procedure. Support for such a provision is noted in the commentary to article 35 of Judge Evensen. 238/

(9) The first sentence of paragraph 5 is based on a provision typically found in the Bryan treaties, discussed earlier in this chapter. The second sentence is an application of that general obligation to the particular needs of a body conducting fact-finding in relation to international watercourses. Both obligations are also supported by the current work of the Special Committee on the Charter, described in paragraph (2) of these comments. 239/

(10) Fact-finding will entail expenses. If it is undertaken by a competent joint organization, associated expenses would presumably be paid from the budget of that organization. If fact-finding is not conducted by such an existing organization, some provision would have to be made for the expenses of the ad hoc expert commission or commission of inquiry. The question of how these expenses should be defrayed is not an easy one to answer and may be beyond the scope of the present draft articles. After considering this question, however, the Special Rapporteur concluded that it might be helpful if he were at least to put forward some tentative proposals that could possibly be discussed and improved upon in the Commission. Depending upon the circumstances of the watercourse States concerned, expenses of an ad hoc expert commission or commission of inquiry could be defrayed by the States themselves, possibly with the assistance of a multilateral development bank. The schematic outline provides that the States concerned "shall contribute to the costs of the fact-finding machinery on an equitable basis." 240/ This general principle would hold true in the present case as well. It would find support, in particular, in the obligation of "equitable participation" under article 6 of the present draft articles.

237/ United Nations, Treaty Series, vol. 961, p. 187.

238/ See J. Evensen, first report (supra, note 2), p. 192, para. 217, citing article 11 of the Revised General Act for the Pacific Settlement of International Disputes of 1949, article 12 of the European Convention for the Peaceful Settlement of Disputes of 1957, and article V of the "Model rules for the constitution of the conciliation commission" annexed to the Helsinki Rules. See also the Bryan treaties, which typically contain a similar provision.

239/ See especially text at notes 233 and 234, supra.

240/ Schematic outline (supra, note 236), section 2, paragraph 7).

Part B

Settlement of disputes

Article 2

Obligation to settle disputes by peaceful means

1. Watercourse States shall settle their disputes concerning international watercourse[s] [systems] by peaceful means in such a manner that international peace and security, and justice, are not endangered.

2. In the absence of an applicable agreement between the watercourse States concerned for the settlement of disputes concerning an international watercourse [system], such disputes are to be settled in accordance with the following draft articles.

Comments

(1) Paragraph 1 is based in Article 2, paragraph 3, of the Charter of the United Nations. Similar provisions were proposed by Judge Schwebel (article 16, paragraph 1) 241/ and Judge Evensen (article 31, paragraph 1). 242/

(2) Paragraph 2 preserves the effect of any applicable procedure for the settlement of disputes that is independent of the present draft articles and binding upon the watercourse States concerned. By "applicable" is meant that the agreement providing for the independent procedure covers, expressly or by implication, disputes concerning international watercourses. Similar provisions may be found in article 16, paragraph 2, as proposed by Judge Schwebel and article 31, paragraph 2, as proposed by Judge Evensen.

Article 3

Consultations and negotiations

1. If a dispute arises between watercourse States concerning the interpretation or application of the present draft articles, the watercourse States concerned shall expeditiously enter into consultations and negotiations with a view to arriving at an equitable resolution of the dispute.

2. The consultations and negotiations provided for in paragraph 1 may be conducted directly between the watercourse States concerned, through a

241/ Schwebel, third report (supra, note 2), at p. 186.

242/ Evensen, first report (supra, note 2), at p. 190.

competent joint organization they have established, or through other regional or international organizations agreed upon by them.

3. To assist them with the consultations and negotiations provided for in paragraph 1, the watercourse States concerned may establish a commission of inquiry in accordance with article 1, paragraph 3, of the present annex.

4. The watercourse States concerned may by agreement request mediation by a third State, an organization or one or more individuals to assist them in the consultations and negotiations provided for in paragraph 1.

5. If the watercourse States concerned have not been able to arrive at a settlement of the dispute through consultations and negotiations within six months, they shall have recourse to the other procedures for the settlement of disputes provided for in the following draft articles.

Comments

(1) Article 3 is based on article 32 proposed by Judge Evensen, entitled "Settlement of disputes by consultations and negotiations". The same idea is reflected in paragraph 4 (a) of article 16 proposed by Judge Schwebel. Paragraph 1 is based on paragraph 1 of article 32 proposed by Judge Evensen. The requirement that watercourse States "enter into consultations and negotiations with a view to arriving at an equitable resolution of the dispute" is inspired by similar language contained in paragraph 1 of article 17, adopted on first reading in 1988.

(2) Paragraph 2 is based on paragraph 2 of article 32 proposed by Judge Evensen. As discussed previously in the present chapter, joint organizations are often granted the authority to settle disputes or resolve questions arising between watercourse States. Paragraph 2 also takes into account the need in some cases for indirect procedures, recognized in article 21 of the present draft articles as adopted in 1988.

(3) Paragraph 3 is based on paragraph 1 of article 33 proposed by Judge Evensen. The establishment of relevant facts may be an integral part of any process of consultations and negotiations. The machinery set up under article 1 would appear to be suitable for this purpose, even though it is envisaged as being applicable even if no "dispute" has yet arisen.

(4) Paragraph 4 is based on paragraph 2 of article 33 proposed by Judge Evensen. In the light of the major role that has been played by mediation in certain important cases concerning international watercourses, ^{243/} this paragraph seemed worth including in the present draft article, if only as a reminder to the watercourse States concerned of the value of mediation in appropriate situations.

^{243/} See especially the discussion of the role of the World Bank in the Indus waters controversy in section B above, at note 147.

(5) Paragraph 5 is based upon paragraph 3 of article 32 proposed by Judge Evensen. The expression "a reasonable period" was replaced with the definite period of six months since that was the period agreed to be a reasonable one in the context of the procedures concerning planned measures contained in part III of the draft articles. While in some cases six months may be too short a period for consultations and negotiations in the context of dispute settlement, the Special Rapporteur believes that a fixed period is necessary to make any subsequent requirement of recourse to compulsory procedures - such as proposed in article 4 - meaningful. Otherwise, resort to such procedures could be delayed, even after it had become clear that consultations and negotiations would not be fruitful, on the ground that a "reasonable" period of time had not elapsed. The Special Rapporteur would welcome the views of the Commission on this question, in particular.

Article 4

Conciliation

1. Any dispute concerning the interpretation or application of the present draft articles that has not been settled in accordance with the provisions of draft article 3 of the present annex shall be submitted by the watercourse States concerned to conciliation as provided in the present draft article. Conciliation may be initiated by any of the watercourse States concerned by written notification to the other party or parties to the dispute, unless the parties otherwise agree.
2. The conciliation commission shall be constituted in accordance with the procedure set forth in annex Y to the present draft articles. It shall determine its own procedure, the place or places where it shall sit and all other administrative matters.
3. The conciliation commission shall file its report with the parties within twelve months of its constitution unless the parties otherwise agree. The commission shall also transmit a copy of the report to the conference of the parties established in draft article 7 of annex I of the present draft articles. The report shall indicate the findings of the commission concerning questions of law and fact pertinent to the matter in dispute and shall record any agreement reached between the parties or, failing such agreement, the recommendations of the commission concerning the settlement of the dispute.
4. The report of the conciliation commission shall not be binding upon the parties to the dispute unless they otherwise agree.
5. The fees and costs of the conciliation commission shall be borne by the parties on an equitable basis.
6. If they have not been able to reach an agreed settlement of the dispute during the conciliation process, the parties shall, upon receipt of the report of the conciliation commission, renew their negotiations on the basis of the commission's report.

Comments

(1) Article 4 is based upon articles 34 to 36 proposed by Judge Evensen. Paragraph 4 (f) of article 16, proposed by Judge Schwebel, also provides for conciliation. Unlike those provisions, however, paragraph 1 of draft article 4 envisages compulsory conciliation - i.e., conciliation to which the parties to a dispute are required to resort, but whose outcome is not binding upon them. This approach was inspired by the practice described in section C of the present chapter, particularly that of GATT.

(2) As in the case of draft article 1 on fact-finding, paragraph 2 of the present draft article does not provide for the procedure for constituting the conciliation commission. It instead refers to a separate (and non-existent) annex, designated for convenience as "annex Y". An excellent model for such a procedure is contained in paragraphs 2 to 4 of article 34, proposed by Judge Evensen. The second sentence of paragraph 2 is to the same effect as article 1, paragraph 4, of the present annex. Support for such a provision is noted in the commentary to article 35 of Judge Evensen. 244/

(3) Paragraph 3 is based upon paragraph 3 of article 35, proposed by Judge Evensen and on relevant provisions of the Bryan treaties 245/ and the United Nations Convention on the Law of the Sea. 246/ However, it also includes a requirement that the report of the conciliation commission be transmitted to the conference of the parties. For the reasons discussed in section C of the present chapter, it is believed that this procedure, while not involving any binding effect of the report, will increase the incentive of the parties to follow the recommendation of the Commission. The 1907 Hague Convention for the Pacific Settlement of International Disputes provides that the report of the international commission of inquiry is to be "read at a public sitting", 247/ presumably for the same purpose of further encouraging the parties to accept the report.

(4) Paragraph 4 reflects the normal characteristic of reports of conciliation commissions, namely, that they are of a recommendatory nature only and are not binding upon the parties.

244/ See note 238, supra.

245/ See, e.g., article V of the Treaty on the Avoidance or Prevention of Conflicts between American States (Gondra Treaty), United States, Treaty Series, 752, Bevans, Multilateral Agreements 1918-1930 (1969), p. 413, at p. 416.

246/ See article 7, paragraph 1 of annex V to the Convention.

247/ Supra, note 137, article 34.

(5) Paragraph 5 is based on paragraph 2 of article 36, proposed by Judge Evensen. Also relevant in this connection is comment 10 to article 1 of the present annex. 248/

(6) Paragraph 6 is based on provisions commonly found in the Bryan treaties 249/ on the International Plant Protection Convention 250/ and on paragraph 4 (d) of article 16, proposed by Judge Schwebel. It is designed to encourage the parties to use the report of the conciliation commission to the best possible advantage prior to resorting to further means of dispute settlement.

Article 5

Arbitration

If after the expiration of six months from the receipt of the report of the conciliation commission provided for in draft article 4 of the present annex the parties to a dispute have been unable to settle the dispute through negotiations, any of the parties may submit the dispute to binding arbitration by any permanent or ad hoc arbitral tribunal that has been accepted by all of the parties to the dispute.

Comments

(1) The first clause of article 5 is based on the sources indicated in comment 6 to article 4. The intent of this clause is thus to require the parties to engage in renewed negotiations for a period of at least six months before resorting to binding dispute settlement.

(2) Article 5 does not require the parties to submit their dispute to binding arbitration. The Special Rapporteur agrees with his two immediate predecessors that recourse to previously accepted means of dispute settlement or to an ad hoc procedure agreed upon by the parties is more likely to be generally acceptable and to produce a result that will be accepted by the parties to the dispute. The corresponding provision proposed by Judge Schwebel provides that the parties may "call for arbitration or adjudication of the dispute in accordance with the optional procedures annexed to these articles". 251/ This is an approach that the Commission may also wish to consider.

248/ See especially text at note 240, supra.

249/ See, e.g., article VII of the Gondra Treaty (supra, note 245).

250/ See text at note 187, supra.

251/ S. Schwebel, third report (supra, note 2), at p. 187, article 16, paragraph 4 (f).